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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 739

MATTHEW J. CONNELLY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner, Matthew J. Connelly, presents this petition for rehearing of this Court's order dated March 31, 1958 denying his petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit and, in support thereof, respectfully shows the following substantial grounds, none of which were urged in his petition.

I. The Petit Jury and the Sixth Amendment

This case presents a substantial question as to the proper adjustment to be made between the rule enunciated by this Court in *Thiel* v. *Southern Pacific Co.* 328 U.S. 217, 220, that there must be no "systematic and intentional exclusion" of any of the "geographical groups of the community," and the implied exception to this rule contained in 28 U.S.C. 1865(a), that "jurors shall be selected from such parts of the

district as the court directs" under certain circumstances defined in the statute. The importance of this question to the everyday operation of the federal court system is too obvious to require comment.

Petitioner's challenge to the array at the outset of the trial raised this question in bold relief. In this case, the petit jury panel was composed of residents of only the rural counties in the judicial district (Tr. 26-35, 48-52, Vol. II). The residents of metropolitan St. Louis—comprising approximately 80% of the population of the division—were expressly excluded by an unprecedented order of the trial judge (Tr. 3213).

Such studied exclusion on the basis of geography is directly contrary to this Court's holding in the *Thiel* case, *supra*. It was there held that

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." 328 U.S. at 220.

And while it was noted that "This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community," this Court expressly declared that this principle "does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups." *Ibid.*

The residents of the excluded counties in this case, like the excluded wage-earners in *Thiel*, "constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to

the democratic nature of the jury system." 328 U.S. at 223; and since the exclusionary order constituted "a prima facie case of discrimination", the burden was thus shifted "forthwith" from petitioner. *Avery* v. *State of Georgia*, 345 U.S. 559, 563.

The counties from which the jury panel was selected have a total population of 294,895; the population of St. Louis and St. Louis County is 1,263,145 (Tr. 3212). This method, therefore, manifestly precluded the selection of a panel drawn from a "cross-section of the community" and necessarily eliminated all the economic, occupational, social, racial, religious and other groups which characterize the population of the large St. Louis metropolitan area. For example, very sizeable Catholic, Jewish, Negro and labor groups are located in St. Louis, but no such comparable groups are found in the rural counties from which the panel was derived. The device adopted by the trial court, and sanctioned by the Eighth Circuit, enables the exclusion of any minority by the simple expedient of excluding the area where such minority may be located. In another case, at another time, this case can be cited as authority for selecting entirely white counties for the trial of a Negro.

To justify this exclusion and the apparent violation of *Thiel*, the court below placed reliance upon *Myers* v. *United States*, 15 F.2d 977 (C.A. 8, 1926) and 28 U.S.C. Section 1865(a) (11a-12a). But the *Myers* case was decided twenty years before *Thiel*. Furthermore, in *Myers*, the exclusionary order rested on a "long-standing practice" to exclude residents of "the county in which the crime was committed". 15 F.2d at 979. Here the procedure adopted by the trial court was unprecedented in its history and devised for this

particular case only (Tr. 3213); further it excluded not only the City of St. Louis, where the crime was allegedly committed, but also the 497 square miles of St. Louis County, wholly outside the *locus delicti*.

Section 1865(a) authorizes the exclusion of parts of the district upon meeting the twofold requirement "so as to be most favorable to an impartial jury, *and not to incur unnecessary expense or unduly burden the citizens of any part of the district*" (emphasis added). Contrary to this statutory precept, the jury panel here was drawn from the more distant rural counties, to the greater expense and burden of the veniremen and to the exclusion of the more proximate metropolitan area.[1]

The cases subsequent to *Thiel* in which the issue of geographical exclusion has been raised discriminated

[1] The rural counties selected by the trial judge for the drawing of the panel varied in distance from downtown St. Louis from 131 to 20 miles. The actual distances from the county seats to the Federal courthouse in St. Louis are as follows:

County	County Seat	Miles to Fed. Courthouse in St. Louis
Audrain	Mexico	111 Miles
Crawford	Steelville	94 "
Dent	Salem	131 "
Franklin	Union	52 "
Gasconade	Hermann	79 "
Iron	Ironton	97 "
Jefferson	Hillsboro	38 "
Lincoln	Troy	54 "
Maries	Vienna	122 "
Montgomery	Montgomery City	82 "
Phelps	Rolla	108 "
St. Charles	St. Charles	20 "
St. Francois	Farmington	75 "
Warren	Warrenton	57 "
Washington	Potosi	70 "
Ste. Genevieve	Ste. Genevieve	67 "

in favor of the residents of metropolitan areas and against the residents of the rural outlying areas;[2] and therefore were the converse of the situation of the case at bar where metropolitan residents were excluded. Almost all rely upon *United States* v. *Gottfried,* 165 F.2d 360 (C.A. 2, 1948) cert. den. 333 U.S. 860, which took only passing note of *Thiel* and relied upon the well worn maxim that the federal judicial system could not possibly be administered "if it were a condition that the [geographic] divisions made must be so homogenous that they showed an equal percentage of all possible groups." 165 F.2d at 364.

Like the Court in *Gottfried,* the Court below also raised this strawman. It noted that "the prospective jurors * * * included a wide range of professions, trades and occupations," were not "exclusively engaged in agricultural pursuits," and that some "had lived in St. Louis or other large cities" or in large towns (12a). But this all confirms rather than denies the fact of the exclusion, and the short answer to all of it was given by this Court in *Glasser* v. *United States,* 315 U.S. 60, 86, when it said:

> "* * * Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment

[2] *E.G. United States* v. *Gottfried,* 165 F. 2d 360 (C.A. 2, 1948) cert. den. 333 U.S. 860; *United States* v *Titus,* 210 F. 2d 210 (C.A. 2, 1954); *United States* v. *Klock,* 210 F. 2d 217, 220 (C.A. 2, 1954) cert. den. 347 U.S. 960; and *Gariepy* v. *United States,* 220 F. 2d 252 (C.A. 6, 1955) cert. den. 350 U.S. 825

> whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties"

And there was no basis for the justification for the exclusion suggested by the Successor Judge that "there had been a great deal of publicity regarding the pendency of the trial," and "the immediate public in the City of St. Louis would be more interested in the happenings in their local courts than people outside the city" (27a-28a). For even he recognized that the "people living outside the confines of the City of St. Louis have access to the radio, television and daily press substantially to the same extent as the so-called urban people" (28a), destroying the only possible argument which could be raised in support of the exclusion.

Moreover, it has been time and again held that the way to insure an impartial trial where there has been unusual publicity, and where motions for change of venue or continuance have been denied, is by careful *voir dire*.[3] *Cf. Gariepy* v. *United States, supra,* 220 F. 2d at 259, *Marson* v. *United States,* 203 F.2d 904, 909-10 (C.A. 6, 1953). The selection of impartial juries is one of the more delicate aspects of our legal system and goes to the heart of the sanctity of the judicial process. There is no need to chop at the foundation of the structure to put out a fire on the top floor.

The problem of geographical exclusion from jury panels is involved in civil as well as criminal trials, and in the selection of grand as well as petit juries. The issue presented is accordingly of fundamental importance to the administration of the federal judicial

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[3] As to the failure of the *voir dire* to insure an impartial jury in this case, see Point II of the Petition and Reply Brief.

system within the framework of the Constitutional guaranty of a fair trial, and calls for consideration by this Court.

II. The Schwimmer Severance

For the first three weeks of trial petitioner, along with his co-defendants, Caudle and Schwimmer, had been in the dock together. During this period, Schwimmer had been the main target of the prosecution. Evidence was piled up against him through documents seized from his files in a crescendo which was climaxed by the testimony of District Judge Moore literally castigating him (Tr. 868), and by the recitals of Schwimmer's own admissions of guilt (Tr. 873).

Schwimmer was the key to the Government case. It was Schwimmer who contacted Connelly on the one hand, and Caudle on the other. Never did the three meet together; never did either Connelly or Caudle ever meet Sachs or any of his other attorneys. It was Schwimmer who engineered the idea of the oil royalty investments both with regard to Connelly and with regard to Caudle. It was Schwimmer who was paid $40,000 by Sachs and who made the calculations reflected in Exhibit 100-J. Schwimmer's presence had poisoned the atmosphere of the trial. Then, suddenly a mistrial had been declared as to him, a mistrial which came before he presented any defense and before he could give any explanation of his conduct.

Schwimmer alone could have explained the evidence against him or supplied reasons or justifications for it. On cross-examination by this petitioner, he could have exonerated petitioner from the damag-

ing implications of what he, Schwimmer, had said and done. His severance from the trial deprived petitioner of his right of confrontation and of cross-examination, which this Court has upheld with constant solicitude.

The post-conspiracy evidence admitted during the trial against Schwimmer alone has been summarized in the footnote on pp. 33-34 of the Petition. In that footnote there is set out in full the testimony of the witness Sheffrey concerning a telephone call he had received from Schwimmer and the gist of that conversation. That testimony is graphic illustration of the type of damage to which Petitioner here alludes.

In recognition of the highly prejudicial character of this testimony, the trial judge, was careful when he withdrew the evidence from the jury, to summarize rather than to repeat it verbatim (Tr. 2912-2916). Nevertheless, the evidence was so highly prejudicial that no withdrawing instruction could be efficacious. Compare *Throckmorton* v. *Holt,* 180 U.S. 552, 567; *Holt* v. *United States,* 94 F. 2d 90, 94 (C.A. 10, 1937); *Lockhart* v. *United States,* 35 F. 2d 905 (C.A. 9, 1929); *Mora* v. *United States,* 190 F. 2d 749, 752-3 (C.A. 5, 1951); *Whealton* v. *United States,* 113 F. 2d 710, 715 (C.A. 3, 1940). See also Jackson J., concurring in *Krulewitch* v. *United States,* 336 U.S. 440, 453. Cf. *Nash* v. *United States,* 54 F. 2d 1006, 1007 (C.A. 2, 1932).

Throughout this litigation, the Government has placed reliance upon this Court's decision in *Delli Paoli* v. *United States,* 352 U.S. 232 as authority for the proposition that petitioner must suffer the consequences of the Schwimmer severance and that a mistrial as to petitioner was not warranted. Petitioner

has as consistently contended that *Delli Paoli* is no authority for the Government's view but, on the contrary, supports petitioner's position here.

(a) In the *Delli Paoli* case, this Court adverted to the fact that the conspiracy was "so simple in its character that the part of each defendant in it was easily understood." 352 U.S. at 241.

The opposite is true here: the oil royalty transactions were complex; the parts in the conspiracy with which the defendants and their alleged co-conspirators were charged were confusing and nebulous; the case concerned in sundry ways and at different times, three members of the Sachs family, the two Shifrin brothers, Sheffrey, Schwimmer, Evans, oil companies, a galaxy of physicians on the one hand and of Department of Justice attorneys on the other, all or most of them allegedly subjected to the influence of one or the other of the defendants or alleged co-conspirators. The record indicates that the defendants never met together, and there is no evidence that the alleged co-conspirators ever met with each other or with the defendants at any one time. Thus, the actual role played by each party, his individual actions, conduct, doings and motives were to be considered separately to determine whether each of the defendants was a conscious participant in the alleged conspiracy.

As the Successor Judge pointed out in his opinion:

> "a case which involved so many incidents and events and which required so many days for trial presented a difficult problem for a jury is evident. * * * The difficult question is whether the evidence as to the complicity of each of these defendants in the conspiracy charged was susceptible of a finding that it is consistent only with that of guilt" (62a).

Clearly, the conspiracy alleged in this case was not the "simple" one involved in *Delli Paoli.*

(b) Contrary to the situation in *Delli Paoli,* where the trial court "postponed the introduction of Whitley's confession until the rest of the Government's case was in, thus making it easier for the jury to consider the confession separately from the other testimony" (352 U.S. at 241), Schwimmer's confession was introduced early in the trial on May 14, 1956 (Tr. 873) and sank deeply in the minds of the jury during the following three weeks of trial.

(c) Unlike *Delli Paoli,* this petitioner had requested a separate trial at the threshold of the case (R. 11, 30).

(d) Another factor relied upon in *Delli Paoli* was that "Whitley's confession merely corroborated what the Government already had established" (352 U.S. at 242), while the converse is true here. The crucial issue in the case, as stated by both the Trial and the Successor Judge was *intent* (Tr. 2893; App. 62a). The evidence in this case is equally consistent with the innocence as with the guilt of petitioner, whose "criminal" conduct rests upon *six* telephone calls made by him on Schwimmer's behalf for appointments and a continuance (Tr. 1923, 582, 2597-9, 2601, 1587). There was nothing in any of these calls which gives rise to any wrong, unless a call from the White House is considered to be *malum in se.* As to the oil royalty, there is no direct evidence refuting the testimony of Government Witness Evans that it consisted of a legitimate business transaction (Tr. 760, 770-4, 784-5).

(e) Finally, unlike the instant case, *Delli Paoli* did not involve the severance of a defendant in mid-trial

and did not deal with the problems which arise from this unusual situation.

This Court only recently admonished that "we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 352 U.S. 391, 404. This case presents an unusual and dramatic illustration of the vice to which that warning adverted. In the failure of the court below properly to appraise the damaging impact on the jury of Schwimmer's testimony and to conclude that no instruction to disregard could possibly have removed the prejudice, and in its improper reliance on the *Delli Paoli* case, its decision represents an unmistakable step in the direction of expanding, rather than narrowing, the conspiracy net. The solicitude which this court has shown for any encroachment in the name of conspiracy on the fundamental rights of an accused stands in marked contrast to the insensitivity of the court below. Since the standard of criminal justice it applied is inconsistent with that enjoined upon it by this Court, this Court's review is essential to bring the two into accord.

III. The Poisonous Exhibit

Unknown to Petitioner, and at a completely undetermined time, Schwimmer made the following entry in a book entitled "Journal":

	"Oct-49
Loan $2500 from I. Sachs	
Shu-Stiles	$10,000
pd out Oil Royalty M.C.	4,200
Held in Escrow to be paid out depending on whether I Sachs case is dropped." (Exhibit 100-J, Tr. 4090)	$5,800

The Exhibit is the thread from which the entire case against petitioner hangs suspended. Until it was received, there was no direct proof connecting petitioner with the Sachs tax conspiracy case. It was, as Judge Hulen noted, "a very poisonous piece of evidence" (Tr. 2884-5) which "would mislead the jury" (Tr. 2885).

When the Exhibit was first offered, the trial court denied its admissibility until entries unrelated to the Sachs case were deleted (Tr. 1243-4). After this was done, the trial court reserved its ruling on May 22 (Tr. 1373) and again on the following day (Tr. 1467).

After a mistrial was granted as to Schwimmer, the court excluded the Exhibit, stating:

> "On the ground it is not conclusive, and without the presence of defendant Schwimmer to explain it, I won't admit it in evidence." (Tr. 1639)

On June 1, 1956, the trial court reversed its ruling and admitted the Exhibit (Tr. 1996). On June 7, 1956 the court announced: "I am still sleeping on it" (Tr. 2733). In the morning of June 11, the court stated:

> "This Exhibit 100-J has given me a lot of concern because of the absence of defendant Schwimmer, and I finally concluded that it should be withdrawn from the jury because the defendant Schwimmer is not here to explain the entries on it and I think it would be unfair to leave it in this record.
>
> "I have thought about it a lot and if Schwimmer were here it would be different, but Schwimmer isn't available to the defendants or either of them to explain it and there is nothing here to show that if they had an opportunity on a later trial to secure his presence that they could have some

explanation for it, so I am going to withdraw 100-J.

* * * * *

"Mr. Newcomb: Your Honor, if Schwimmer had never been a defendant it would be admissible.

"The Court: Yes, but he is a defendant and he is not dead, and it doesn't correspond with the facts that you have introduced in the case" (Tr. 2881-2882).

* * * * *

"Mr. Newcomb: It isn't proper for me to ask for any concession, but certainly what I would do if I represented the defendants and they are in a position where we have to go to the jury without it and have no right of appeal, no right of review, and I could say more, except that I sincerely—

"The Court: Of course, that isn't all your evidence; it's just one scrap of evidence. It is a very poisonous piece of evidence" (Tr. 2884-5).

* * * * *

"The Court: That's what I am worried about is the final sentence, it would mislead the jury as to what the balance of that money would be used for. You draw one conclusion and the defendants have no opportunity to show that that conclusion is an erroneous one. The last line of it, 'balance to be paid on case being dropped,' as I recall it. It doesn't say who to" (Tr. 2885).

After the noon recess, the court again reversed its ruling and admitted the exhibit not without serious misgivings:

"I have reread your briefs on 100-J during the noon hour. I am not satisfied, but I am going to leave it in the record. I think it is a very doubtful question, but I am going to leave it in the record. I spent the noon hour going over your briefs again. Your cases are not on conspiracy and the Government's are, but it

is still a question that gives me a lot of concern, so I think that is the best thing to do about it" (Tr. 2912).

Judge Hulen's vacillation respecting the admissibility of 100-J reflected the dilemma in which he found himself: on the one hand, he recognized the crucial importance to the prosecution case of this Exhibit and its potentially serious impact on the jury; and on the other hand, he recognized that many firm principles of law precluded its admission. He resolved the problem in favor of admissibility and thereby, we submit, fell into serious and prejudicial error.

Judge Nordbye rejected petitioner's contention that 100-J was the "entry of a mere narrative event" (60a). He concluded that the entry constituted an earmarking or allocation of a "slush fund" (*ibid*) created to carry out the conspiracy. The court below was "in accord with Judge Nordbye's views" (19a), adding only that there was "independent evidence"—to the effect that on October 12, 1949, Sachs had given Schwimmer a $10,000 check in addition to a prior payment of $2,500 on September 22, 1949—to show that the entries in the Exhibit were made during the existence of the conspiracy (*ibid*).

The rulings of the courts below are plainly in error for three reasons: (a) there is no evidence that 100-J was made during the existence of the alleged conspiracy; (b) the exhibit is a narrative statement of past events; and (c) it is vague and speculative.

(a) There is no evidence that the entries included in the Exhibit were made by Schwimmer during the existence of the alleged conspiracy. The record is completely barren of any information as to when the

entry was made by Schwimmer. Clearly, the mere notation at the top of the page ("Oct-49") cannot be deemed to establish that it was made during that month, because the essential foundation of the time element, which is the prerequisite to the admission of a document, cannot be shown by the proffered document itself. See e.g., *Masterson* v. *Penn. R. Co.*, 182 F. 2d 793, 796-7 (C.A. 3, 1950).

Nor can the essential element of the time when the entries were made be supplied by inferences and speculations, such as those relied upon by the opinion below. Why should Schwimmer have recorded in October the receipt of a September payment, which is also reflected on the previous page of the same book under the month September (100-G)? Exhibit 100-G shows receipt of $2,400 as "Shu-Stiles advance or loan." Exhibit 100-J lists $2,500 as "loan from I. Sachs." There is but one check issued by Shu-Stiles to Schwimmer in that period for a similar amount. That is Exhibit 21-I, a Shu-Stiles check issued to Schwimmer on September 22nd in the amount of $2,500 which finds its apparent counterpart in Schwimmer's statement to Shu-Stiles of September 23: "Services rendered .... $2,500.00" (Ex. 22-G).

The several discrepancies in these entries undermine rather than support the contention that they were made at the time the transactions took place. The discrepancies are even more crucial as to the alleged $4,200.00 payment for an "oil royalty M.C." The uncontroverted facts in the record show that in October 1949, Schwimmer had not paid a single penny on the oil royalty for Connelly, nor did he at any time thereafter ever pay the amount of $4,200. Schwimmer did not purchase the oil royalty until December

30th—and then for $3,600 and not for $4,200 (Tr. 1101-2). The time the entry was made is as nebulous as the reason for Schwimmer making it. Was it concocted as a fictitious tax picture to account for the payment by Shu-Stiles to Schwimmer of $10,000 which the record shows was not listed on Schwimmer's tax return? If so, there was a motive for Schwimmer to make the entry in connection with, or in anticipation of, an audit of his return which might take place during any of the years following 1949.

Since there is no evidence that the entry was made by Schwimmer during the existence of the conspiracy, and the burden to prove that it was so made rested on the prosecution, the admission of Exhibit 100-J was clearly error. *Krulewitch* v. *United States*, 336 U.S. 440, 443; *Fiswick* v. *United States*, 329 U.S. 211, 217.

(b) The entry is inadmissible for the additional reason that it consists of a narrative statement of a past transaction made by Schwimmer alone and not in furtherance or in pursuance of the alleged conspiracy. The use of the past tense "pd out" is in itself conclusive. The entry is legally similar to the statement made by a conspirator to his wife about the purpose of a conspiracy, which was held erroneously admitted. *Mayola* v. *United States*, 71 F. 2d 65 (C.A. 9, 1934). In accord: *Van Riper et al.* v. *United States*, 13 F. 2d 961, 967 (C.A. 2, 1926); *United States* v. *Goodman*, 129 F. 2d 1009, 1013 (C.A. 2, 1942); *United States* v. *Guido et al.*, 161 F. 2d 492 (C.A. 3, 1947). Compare: *Fiswick* v. *United States*, *supra*; *Krulewitch* v. *United States*, *supra*; and *Lutwak* v. *United States*, 344 U.S. 604, 617.

(c) In its final and perhaps crucial part, the Exhibit is vague, uncertain and speculative. $5,800 "to

be paid out depending on whether I. Sachs case is dropped" does not disclose to whom. The element of uncertainty as to the intended recipient of payment invited the jury's most dangerous speculation, as the trial judge twice recognized with great concern (Tr. 1639, 2885). The "vague" and "uncertain" nature of the entry makes the Exhibit inadmissible within the rule of *McDonald* v. *Robertson et al.*, 104 F. 2d 945, 948 (C.A. 6, 1939).

Admission of the Exhibit in evidence allowed "speculation [to] run riot. Speculation cannot supply the place of proof." *Moore* v. *Chesapeake & Ohio R. Co.*, 340 U.S. 573, 578. As Judge Youngdahl stated in *United States* v. *Townsend*, 151 F. Supp. 378, 381-2 (D.C. D.C., 1957):

> "* * * In determining the admissibility of evidence of doubtful probative value, courts should not be unmindful of the eventual role the evidence is likely to play in the jury's considerations. Where the challenged evidence constitutes a significant part of the Government's proof, a higher standard of probative value than might be applied in other circumstances appears desirable."

The admission of Exhibit 100-J resulted in an unwarranted expansion of the dragnet doctrine of conspiracy in circumstances which violate the spirit, if not the letter, of the law. The case against Connelly, as the Successor Judge conceded, presented "troublesome" and "close" questions (53a). The evidence against him was entirely circumstantial, and the case against him necessarily rested on inference and conjecture. Exhibit 100-J was the legal coagulant: absent 100-J, the prosecution case against Connelly dissolved. The Court, in the exercise of its supervisory powers in the administration of criminal

justice in the federal courts, should not permit petitioner's conviction to go unreviewed when it rests on so tenuous a basis.

IV. The Cumulative Effect of the Errors Below Deprived Petitioner of Due Process

This is, admittedly, a difficult case on both the law and the facts. Its delicate questions worried the trial judge until the day of his death (Tr. 2885, R. 152-3) and then his successor (53a-54a).

The judge who saw and did not rule considered this petitioner "a glad hander and a greeter [who] had done nothing more than I might have done had I been in his situation" (R. 152-3). This was the conclusion of the "thirteenth juror", who had "the feel of the case", but was precluded by death from adjudicating. Not only the substance but even the appearance of justice stands unsatisfied.

Where, as here, a criminal trial is had before a jury selected to the exclusion of a fair cross-section of the community, and on which certain members concealed relevant facts bearing on their impartiality; under the impetus of an overzealous prosecutor who repeatedly transgressed the bounds of fair play; and under circumstances where the defendant whose guilt was admitted was severed in mid-trial, after highly damaging evidence had been introduced against him alone; it seems plain that there has been a miscarriage of justice. And this miscarriage becomes all the more substantial when to it is added the fact that the case was tried in an atmosphere heavily saturated with adverse pre-trial publicity engendered by the Government, and in a forum intrinsically burdensome on this

petitioner and far removed from the area where important defense witnesses were located.

And when in combination with the foregoing are added the crucial circumstances that the evidence was at best tenuous and equally consistent with innocence as with guilt, and that the case was tried before a judge who was ill and determined by a judge who had not presided at the trial and who had not—until the act of sentencing—ever laid eyes on this petitioner, there is clearly presented a case which calls for final adjudication by this Court.

Even if it be deemed that any one of these issues singled out and standing alone may not in and of itself require reversal, we submit that when these errors are taken together their cumulative effect is clearly to create a cloud over the entire trial proceedings to the extent that it cannot be said with fair assurance that petitioner's substantial rights were not affected. Cf. *Kotteakos* v. *United States,* 328 U.S. 750, 764-5. This amounts to a denial of due process of law, and warrants plenary review by this Court.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully requested that a rehearing be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, John H. Lashly, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

Counsel for Petitioner